



June 30, 1993

Office of the General Counsel  
Rockville, MD 20857

TO : Robert A. Marsland  
Director of Headquarters Operations  
Indian Health Service

FROM : Barbara Hudson, Attorney  
Public Health Division

SUBJECT : Questions Regarding the Transition from Title I  
"Contracts" to Title III "Compacts"

The purpose of this memorandum is to follow-up our meeting of June 29 and to discuss some of the issues surrounding the transition from contracts under Title I of the Indian Self Determination Act (ISDA) to compacts and funding agreements under Title III of ISDA. We understand that some tribes that have Title I contracts desire to enter into compacts and funding agreements pursuant to Title III. In some instances, the existing Title I contract spans fiscal years. For example, the Title I contract may be effective from May 1, 1993 through April 30, 1994 which includes both Fiscal Year (FY) 1993 and FY 1994. Further, these contracts have been funded with FY 1993 funds for the entire contract period. These tribes now would like to enter a compact and funding agreement effective in late September, e.g., September 30.

It is our understanding that the Indian Health Service (IHS) desires--

to sign compacts and funding agreements on or about June 30 with a proposed effective date of September 30,

to terminate the Title I contracts immediately prior to the effective date of the compact, e.g., September 29,

to deobligate the FY 1993 funds from the Title I contract and reobligate these funds to the Title III funding agreement for expenditure for non-recurring needs, and

to provide FY 1994 funds to the Title III compact and funding agreement beginning October 1, 1993.

You have asked our advice on IHS' proposed course of action. Before we address some of the issues surrounding the transition from a Title I contract to a Title III compact, it is important to understand that even though the purpose of a Title I contract and a Title III compact may be substantially the same, the transition between legal instruments constitutes a change in the underlying requirements and funding authority. With this understanding in mind, we turn to specific issues concerning the transition from Title I Self-Determination contracts to Title III Self-Governance compacts.

1. Deobligating FY 1993 Funds from the Title I Contract and Reobligating Such Funds to the Title III Compact and Funding Agreement.

As a general rule, funds may not be transferred between legal instruments. Funds that have been obligated under a Title I contract must either be used under that instrument or returned to the Federal government through deobligation. Such funds may not be simply transferred and used under a new legal instrument.

However, within the original period of availability, funds may be deobligated from one instrument and reobligated to another instrument. If FY 1993 funds are deobligated before the end of the fiscal year 1993, they are treated as if they had never been obligated in the first place. These funds may then be reobligated subject to purpose, time, and amount restrictions in the appropriation act. Therefore, funds deobligated from a Title I contract in FY 1993 would be available for obligation to a Title III compact and funding agreement in FY 1993.

It should be carefully noted that funds deobligated after the expiration of the original period of obligation availability are not available for new obligations. (Principles of Federal Appropriations Law, 2d Ed. at 7-52 (1992), 64 Comp. Gen. 410 (1985); 52 Comp. Gen. 179 (1972)). For example, let's say that IHS enters a compact with a proposed effective date early in FY 1994, e.g., October 25. The tribe has substantial carryover from FY 1993. Absent some specific Congressional authority, if these FY 1993 funds are deobligated, they will not be available for reobligation in FY 1994.

The rule in its traditional form is well-settled: funds deobligated from an expired period of availability may not be reobligated in the current or a subsequent fiscal year unless Congress has expressly provided such reobligation

authority. Therefore, if carryover funds from a prior fiscal year under a Title I contract are deobligated, they will be lost, and IHS may not reobligate these funds to a new Title III compact and funding agreement.

A word of caution is appropriate. If IHS deobligates funds from prior fiscal years and reobligates them in the current fiscal year, it may be open to arguments that it has violated the Anti-Deficiency Act. The Anti-Deficiency Act carries criminal penalties and forbids incurring obligations in the absence of available appropriations to cover the obligation. (31 U.S.C. 1341).

## 2. Principles Related to Replacement Contracts.

The general rule discussed above is that funds deobligated after the expiration of the period of availability for obligation lapse. The Comptroller General has recognized at least one exception to this general rule, commonly called the replacement contract. Under the replacement contract theory, funds may remain available for obligation beyond the expiration of the period of availability, if certain conditions are met.

1. The bona fide need which existed for the original contract must continue to exist up to the award of the replacement contract. (Principles of Federal Appropriation Law at 5-27)
2. The replacement contract must not exceed the scope of the original contract. (Id. at 5-28) If the scope of the replacement contract exceeds the scope of the original contract then it is characterized as a new obligation and funds available for obligation at the time of the replacement contract must be used.
3. The replacement contract must be awarded within a reasonable amount of time after the termination of the original contract. (Id. at 5-28)

In the transition from a Title I contract to a Title III compact and funding agreement, it is questionable whether the second criteria listed above would be satisfied. Title III compacts and funding agreements are for demonstration purposes which differ in significant ways from Title I contracts. Thus, because the scope of the compact and funding agreement may differ from the scope of the original contract, it is questionable whether this criteria could be met.

Moreover, the Comptroller General has applied the replacement contract rule only in two basic situations: (1) to defaults and (2) to terminations for the convenience of the Government. In the latter category, the Comptroller General has required that the original contract award must have been improper. In other words, there must be clear evidence that the award by the agency was erroneous. (Id. at 5-30; 60 Comp. Gen. 591, 595 (1981); 68 Comp. Gen. 158 (1988); and 70 Comp. Gen. \_\_\_\_ (B-238548, February 5, 1992)).

Thus, the replacement contract theory is not applicable to the transition from a contract to a compact. The transition does not involve any default on the original contract nor was the contract erroneously awarded.

3. Funding of Title I Contracts and Title III Compacts.

Section 303(b) of the ISDA, as amended, states

For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe--

shall not be entitled to contract with the Secretaries for such funds under section 102 (25 U.S.C.A. 450f), except that such tribe shall be eligible for new programs on the same basis as other tribes.

Essentially, this section prohibits a tribe from receiving funding under Title I and Title III for essentially the same activities for the same period of time. For example, lets say that a tribe receives a Title I contract on May 1 with funding for the period May 1, 1993 through April 30, 1994. Then, the tribe decides to enter a Title III funding agreement effective September 30, 1993. In this example, the tribe would receive funding for the period September 30, 1993 through April 30, 1994 under both a Title I contract and a Title III compact. If the funds are for the same basic services, this would violate section 303(b).

In our meeting on June 29, IHS staff indicated that the reobligated FY 1993 funds will be reobligated for different, non-recurring needs, i.e, for needs other than those recurring needs on which the annual funding is based. Thus, we are advised that FY 1993 funds will not be used for the same purpose as FY 1994 funds obligated to the Title III compact. Specifically, IHS staff indicated that these reobligated FY 1993 funds would be used only for non-recurring needs. If the reobligated FY 1993 funds and the

FY 1994 funds provided under the compact are used for different activities, we do not believe section 303(b) would be violated. However, we strongly recommend that the compact clearly state that the FY 1993 reobligated funds are one-time funds to be used for non-recurring needs.

Finally, for the record, we note that IHS did not provide this office with the opportunity to review the specific Title III compacts and funding agreements that IHS negotiated with the tribes. As we previously communicated to you, we believe that the model compact, which we did review, contains significant legal problems. We believe that to enter legally binding instruments without the benefit of legal counsel carries inherent risks for the future administration of the program.

I hope this information is helpful to you. This office is willing to assist you in the transition from Title I contracts to Title III compacts in whatever way we can. If you have further questions, please give me a call at 301-443-1212.

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